



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

v.

LILLIAN M. ORR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF OF APPELLANT

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported as *Orr v. Orr*, Ala., 351 So.2d 906 (1977). The opinion of the Court of Civil Appeals of Alabama is reported as *Orr v. Orr*, Ala.Civ.App., 351 So.2d 904 (1977). The Circuit Court of Lee County, Alabama, did not issue an opinion.

JURISDICTION

The Order of the Supreme Court of Alabama from which Mr. Orr appeals was entered on November 10,

1977. On January 30, 1977, Mr. Orr properly filed his Notices of Appeal, and on February 8, 1977, Mr. Orr filed his Jurisdictional Statement with this Court. On May 30, 1978, this Court noted probable jurisdiction in this appeal. On June 21, 1978, Mr. Orr requested from the Clerk of this Court an extension of time in which to file his brief. On June 23 the Clerk of this Court granted Mr. Orr's request and extended the time for the filing of his brief through July 31, 1978.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2).

QUESTION PRESENTED

The ultimate question presented is whether Alabama's alimony statutes are constitutional. By the statutes' terms, only a man can be required to pay alimony, and this distinction between men and women gives rise to Mr. Orr's question. Specifically: Do these statutes violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by virtue of their absolute reliance on a gender-based classification?

STATEMENT OF THE CASE

This proceeding began in the Circuit Court of Lee County, Alabama, as a contempt action brought against Mr. Orr to enforce the terms of a divorce decree issued by that court on February 26, 1974. On June 28, 1976, Ms. Orr filed in the Circuit Court a Petition for Rule to Show Cause and for Judgment asking that judgment be entered against Mr. Orr for accrued but unpaid alimony, for her attorney's fees and costs generated by her petition, and for contempt (App., p. 3). On August 19, 1976, at the hearing of Ms. Orr's petition, Mr. Orr submitted in his defense a motion requesting that Alabama's alimony statutes be declared unconstitutional (App., p. 16). On

that same day, the Circuit Court denied Mr. Orr's motion (App., p. 18) and entered judgment against Mr. Orr for \$3,312.00 due as accrued alimony, \$212.00 due as insurance premiums and \$2,000 awarded as fees to Ms. Orr's attorneys (App., p. 21). In its judgment, the Circuit Court did not refer to any authority supporting the constitutionality of the challenged statutes and did not exhibit its rationale for upholding their constitutionality.

Relying solely on the unconstitutionality of Alabama's alimony statutes, Mr. Orr appealed the judgment of the Circuit Court. On March 16, 1977, the Court of Civil Appeals of Alabama affirmed that judgment and upheld the constitutionality of these statutes. The opinion issued by that court relied on *Murphy v. Murphy*, 232 Ga. 352; 206 S.E.2d 458 (1974), *cert. den.*, 421 U.S. 929 (1975), and that case's analysis of *Kahn v. Shevin*, 415 U.S. 351 (1974), to conclude that alimony limited to women only was a constitutional means of cushioning the effect of spousal loss through divorce for that sex which feels the disproportionately heavy burden of that loss, 351 So.2d 904.

On May 24, 1977, the Supreme Court of Alabama granted Mr. Orr's Writ of Certiorari to the Court of Civil Appeals for review of that court's judgment but then, on November 10, 1977, quashed its Writ as improvidently granted without issuing a majority opinion. Three Justices of that court did, however, issue personal opinions. Justice Almon, joined by Justice Bloodworth, concurred specially taking the position that the challenged statutes "are designed to foster and preserve the family unit, a constitutionally permissible area for legislation," 351 So.2d at 906, while Justice Jones dissented after concluding that the classifications of the statutes lacked the necessary relationship to the purposes of the statutes

under the test of *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) and that in any event the object of the statutes, protecting the lone female, was in itself improper, 351 So.2d at 909.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, § 1.

No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Code 1975, §§ 30-2-51 through 53.¹

§ 30-2-51

If the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the conditions of his family.

§ 30-2-52

If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance to the wife out of the husband's estate, or not make her an allowance as the circumstances of the case may justify, and if an allowance is made, it must be as liberal as the estate of the husband will permit, regard

¹ Formerly *Code of Alabama*, Title 34, §§ 31-33 (1940). Upon recodification these sections underwent certain minor, technical changes. These changes have no bearing on the issues presented by this appeal, however, and the order of the Supreme Court of Alabama was entered after recodification.

being had to the condition of his family and to all the circumstances of the case.

§ 30-2-53

If the divorce is in favor of the husband for the misconduct of the wife and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife.

SUMMARY OF ARGUMENT

By awarding alimony to women only, Alabama's alimony statutes incorporate gross generalizations based on gender and allocate legal rights and responsibilities between Mr. and Ms. Orr according to their respective gender in an area of litigation where courts should be most sensitive. Neither the legislature nor the courts of Alabama have ever considered whether these generalizations have any basis in reality, but, instead, the statutes focus on gender solely as a result of "traditional notions" of the roles of men and women. Similarly, the statutes' historical origins and more recent judicial applications indicate that they are intended and applied to preserve these traditional roles. While the Court of Civil Appeals asserted in its opinion in this case that the statutes' purpose is to aid needy women such as Ms. Orr, the court gave no support for its assertion, other decisions indicate that need plays a very minor role in determining the amount of alimony awarded, and the record in the case does not indicate that the trial court ever investigated or made any findings regarding Ms. Orr's needs. Moreover, because the courts of Alabama must, as a matter of public policy, apply its alimony statutes for the benefit of women, Mr. Orr was effectively de-

prived of an impartial forum in which to adjudicate the financial issues raised by Ms. Orr's filing for divorce.

Consistent with the historical purpose of these alimony statutes, neither Ms. Orr nor any representative of Alabama has ever explained why men are excluded from their coverage. Mr. Orr is saddled with the alimony obligation which he contests in this action solely because of his status as a man who was formerly married to Ms. Orr. Because alimony is a direct obligation owed by *a person* rather than society or a class as a whole and because it is awarded without respect to any fault or wrongdoing on the part of that person, Alabama's exclusion of men from its protection but not its liability is particularly acute and unfair.

The immediate injury to Mr. Orr caused by these statutes is obvious: he suffers under a very substantial financial obligation and never had an opportunity to fairly adjudicate its propriety in an impartial forum. The discrimination of the statutes also cause more subtle but pervasive injury to all parties, however. By the statutes' application and enforcement, men and women in Alabama are trapped in the traditional gender roles which the statutes reflect. A man owing alimony is particularly constrained to act in the realms of economics and employment as Alabama feels a husband properly should. Then, too, their gender distinction represents Alabama's judgment of the capabilities and competency of women as a class whether the statutes are ever applied or not. In this regard, the distinction not only denigrates each woman's sense of her self and psychologically relegates her to her "proper place," but also disrupts the free and mature development of society.

ARGUMENT

I.

INTRODUCTION

Ms. Orr's divorce from Mr. Orr was a very personal and intimate event. The dissolution of a union of some years between two people is a traumatic and touching affair, the ultimate effects of which can not be measured by economic, sociological or psychological standards. This Court recognized these points and the particular legal significance of divorce in *Boddie v. Connecticut*, 401 U.S. 371 (1971), when it struck down Connecticut's requirement that petitioners for divorce must pay court and service costs as a condition precedent to having their petition heard. While the Court realized that the states had a great deal of latitude in protecting their courts from frivolous litigation, it held "that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." 401 U.S. at 374. In this appeal, Mr. Orr asserts that the same considerations apply under the Equal Protection Clause to require Alabama to deal fairly as between the parties to a divorce proceeding.

When Ms. Orr petitioned the Circuit Court of Lee County for a decree of divorce from Mr. Orr, she initiated an action in which the Alabama directly and decisively involved itself. "The State is a silent party to divorce actions, public policy is involved and the integrity of the court's decrees are involved," *Winston v. Winston*, 279 Ala. 534, 538, 188 So.2d 264, 267 (1966), concern-

ing an effort to set aside a divorce granted some years later. Of course, the particular policy of which Mr. Orr complains is that which is incorporated into Alabama's alimony statutes, Code of Alabama 1975 §§30-2-51, 52 and 53. Without examining the precise content and historical antecedents of this policy at present, Mr. Orr asserts that through these statutes, the State undeniably discriminates along gender lines; regardless of fault women may always be awarded alimony, but men can never be. If a reading of these statutes does not make this point clear, the cases decided pursuant to them surely do. In *Davis v. Davis*, 279 Ala. 643, 180 So.2d 158 (1966), the Supreme Court of Alabama reviewed a divorce decree awarding the husband custody of the parties' minor child and use of the parties' house in Gadsden, Alabama, as a home for him and the child. The court reversed the award as to the house stating, "[i]n effect, the wife, to the extent of her one-half interest in the Gadsden property, is being required to contribute toward the maintenance and support of her husband . . . In the absence of a statute so providing, there is no authority in the State for awarding alimony against the wife in favor of the husband. [citations omitted] There is no statute authorizing such award. The statutory scheme is to award alimony only in favor of the wife." 279 Ala. at 644, 189 So.2d at 159, 160. As recently as 1973, the Court of Civil Appeals of Alabama reaffirmed this position in *Grant v. Grant*, 49 Ala.App. 559, 274, So.2d 339 (Civ.App. 1973).

In short then, the State of Alabama intruded into the divorce proceedings of Mr. and Ms. Orr and, based upon the sex of the parties, allocated to Ms. Orr a right or potential benefit which was not accorded Mr. Orr. Moreover, this intrusion was into the sort of a proceeding which this Court has recognized as particularly sensitive and requiring the highest degree of respect for the parties

as persons. As will be shown, however, the State's allocation of alimony rights treated the parties as representatives of out-moded sexual stereotypes. By its intrusion, Alabama captured the parties at their most vulnerable moment psychologically, reinforced these stereotypes and ultimately reinforced the sex roles incorporated in these stereotypes by an actual award and enforcement of alimony.

II.

ALABAMA'S ALLOWANCE OF ALIMONY ONLY TO WOMEN AND THE JUDICIAL CONCERNS WHICH THE STATE ASSERTS IN THE IMPLEMENTATION OF ITS ALIMONY STATUTES ARE BASED ON ARCHAIC NOTIONS AND GENDER ROLES RATHER THAN ANY GROUND OF DIFFERENCE BETWEEN MEN AND WOMEN.

The alimony statutes underlying the Circuit Court of Lee County's charge of alimony to Mr. Orr were premised on the consideration that Ms. Orr, as a woman, could not support herself: but for alimony a woman might become a ward of the State so the State solicitously protects her, again as a woman, from having to economically fend for herself. "The basis for these statutes is the common-law obligation of a husband to support his wife." *Davis*, 279 Ala. at 644, 189 So.2d at 160. "The duty to pay alimony is because of the duty of a man to support his wife," *Sims v. Sims*, 253 Ala. 307, 311, 45 So.2d 25, 29 (1950), reversing a lower court's modification of an alimony award for insufficient evidence of a change in the parties' circumstances. Alabama has further defined this common-law obligation of support as both a public and a private duty. *Ortman v. Ortman*, 203 Ala. 167, 82 So. 417 (1919), was a review of an award of temporary and permanent alimony. In its review, the Court also analyzed the foundations of the support duty

underlying the award and said: "[a] man owes a duty of such maintenance to his family as well as the State; not only that he keep them from becoming a charge on the body politic [citations omitted], but properly to maintain them, having regard to their established conditions in life and the circumstances materially affecting their lives and pursuit of happiness as citizens." 203 Ala. at 167, 168, 82 So. at 417, 418.

This support duty upon which Alabama relies to explain its alimony statutes is rooted in a centuries old perception of the proper social and moral place for men and women.

[T]hese rules acquire much of their force and vitality from the fact that they construct a model of correct behavior. They are moral precepts. . . .

They describe the traditional roles of husband and wife. The husband is to provide the family with food, clothing, shelter and as many of the amenities of life as he can manage, either (in earlier days) by management of his estates or (more recently) by working for his wages. The wife is to be mistress of the household, maintaining the home with the resources furnished by husband, and caring for the children. A reading of the contemporary judicial opinions leaves the impression that these rules have not changed over the last two hundred years, in spite of the changes in the legal position of the married women carried through in the Nineteenth Century and in her social and economic position in this century [citation omitted]. One can only account for the tenacity of these rules on the theory that since they express moral precepts backed up by religious teachings they are independent of time, place and circumstances.

H.H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* §6.1 at 181, 182 (1968). See

also, B. Brown, A. Freedman, H. Katz and A. Price, *WOMEN'S RIGHTS AND THE LAW* (1971) at 128, 129, and S. de Beauvoir, *THE SECOND SEX* (Modern Library ed. 1968) at 426, 427. Although the statute's themselves and subsequent legislative action concerning them have not altered their purpose of protecting traditional gender role models, the Court of Civil Appeals of Alabama did try to sanitize this purpose in its decision in this case by noting: "It is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed." Ala.Civ.App., 351 So.2d at 905. Apparently the Court of Civil Appeals concluded its equal protection research with *Kahn v. Shevin*, 416 U.S. 351 (1971), and felt this after the fact delineation of purpose without any documentation would save the statutes.

Kahn upheld a Florida statute which gave a \$500.00 property tax to widows, but not to widowers, and in its opinion the Court accepted the Supreme Court of Florida's finding that the statutes object was to reduce "the disparity between the economic capabilities of a man and a woman:" 416 U.S. at 352. In cases decided subsequent to *Kahn*, however, the Court has refused to accept a simple assertion of any particular purpose and has delineated how far Ms. Orr must go to establish the purpose of Alabama's alimony statutes as aiding needy women after divorce. In *Weinberger v. Wiesenfeld*, 420 U.S. 436 (1975) the federal government argued that its payment of higher "Mothers'" social security benefits to a widow than to a widower was in an effort to compensate her for the employment discrimination which she would presumably face upon entering the market place. This Court emphasized that it must look for itself to find the true purpose of the distinction drawn between men and women, found the true "pur-

pose" to be Congress's assumption that widows, but not widowers, would stay at home to raise their children rather than enter the job market, and held the distinction unconstitutional. Similarly, *Califano v. Goldfarb*, 430 U.S. 199 (1977), was a challenge to the government's requirement of proof of dependency by a widower, but not a widow, before he could receive Old-Age, Survivors and Disability Insurance benefits with respect to his deceased wife's earnings. The government argued that the requirement reflected a conscious tailoring of the standards of eligibility by reasoning that the benefits were generally paid only on the basis of need but in view of the employment discrimination which women faced it could fairly assume that all women were needy as compared to men who had not been dependent on their wives. Again the Court looked behind the asserted purpose. Since the provision in question was phrased in terms of dependency rather than need, since the benefits were paid as insurance to replace lost wages, and since the legislative history of the Social Security Act showed these benefits were extended to men to equalize the benefits accorded insured men and women wage earners, the Court held that the discrimination was not constitutionally justified.

Contrasted with *Wiesenfeld* and *Goldfarb* is *Califano v. Webster*, 430 U.S. 313 (1977), where the Court upheld different methods of computing social security retirement benefits for men and women after finding that: "the legislative history is clear that the differing treatment of men and women . . . was not the accidental by-product of a traditional way of thinking about females [citations omitted], but rather was deliberately enacted to compensate for particular economic injuries suffered by women." 430 U.S. at 320. Similarly, the Court accepted the government's contention that different time

regulations governing discharge of men and women naval officers were intended to provide for more equal career treatment after finding that "the differing treatment of men and women naval officers . . . reflects not archaic and overbroad generalizations, but instead the *demonstrable* (emphasis added) fact that male and female line officers are not similarly situated with respect to opportunities for professional service." *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

On their faces, the challenged statutes are not cast in terms of aiding needy widows. All three statutes left the determination of an award and its amount to Ms. Orr to the discretion of the Circuit Court of Lee County and §§ 30-2-51 and 52 particularly required the judge to take the size of Mr. Orr's estate into account in determining the size of the award. Further, these sections' references to the "conditions of his family" did not direct the court to investigate Ms. Orr's needs, but to her sex, health, station in life and the duration of her marriage among other things, *Shirley v. Shirley*, Ala.Civ.App., 350 So.2d 1041 (1977), *cert. quashed*, Ala., 350 So.2d 1045 (1977), increasing a trial court's award for equitable reasons. Sections 30-2-52 and 53 also directed the court to regulate its award of alimony by reference to any misconduct of either party if the divorce had been granted on that ground. Considering the assertion of the Court of Civil Appeals, if Ms. Orr had been guilty of misconduct she apparently would have been less needy than if not; conversely, if Mr. Orr had been guilty of misconduct, then Ms. Orr would necessarily have been more needy as a result of his transgressions. Further, even in a divorce not grounded on misconduct of one of the spouses, "the trial court may consider the conduct of the parties" in determining an award of alimony. *Shirley*. Leaving the statutes' faces, no original or subsequent legislative his-

tory provides any support for the position of the Court of Civil Appeals, but cases in which alimony has been awarded reflect the relatively minor role which need plays in determining the size of the award.

The analysis of the Court of Civil Appeals in *Shirley* is a good example of the ad hoc approach of the courts in fixing an alimony award and of the incidental relevance of the wife's needs.

It is clear that the distinguished trial judge, in the matter now before this court, relied heavily on the aspect of the wife's conduct. It is equally clear that there is ample evidence that her conduct in large measure caused the marriage to fail. However, the fact [*sic*] remains that the parties were married for 10 years, the wife having married the husband when she was 16 years old; that the wife during this time performed normal household duties; that she was a good mother; that she has no marketable skill; that she has only a high school education; that she had some slight psychiatric or emotional problem.

On the other hand, the husband is a prosperous, industrious young business man. His income is over \$100,000 a year; he has \$171,000 in savings; he has real property with a value exceeding the indebtedness thereon of approximately \$80,000; his health is apparently good; his prospects in life are good.

As noted earlier, the wife and child received \$600 per month total as alimony and child support. Additionally, the wife was awarded the homeplace, but apparently is responsible for the mortgage payments of approximately \$200 per month. She also received certain personal property and certain specific medical care.

Considering all of the above, we find that the learned and distinguished trial judge did abuse his

discretion and that the award to the wife and the award of child support is contrary to law and equity.

Ala.Civ.App., 350 So.2d at 1044. Thus, while the court noted attributes of Ms. Shirley which indicated need on her part—her lack of education and a marketable skill and her emotional problem—the court did not investigate the financial extent of this need but focused on her lengthy performance of her “normal household duties,” on her characteristics as a mother and on her husband's estate.

The statement of the Court of Civil Appeals notwithstanding, Alabama's alimony statutes are not for the protection of needy women after divorce. Their legislative origins reflect nothing more than an incorporation and extension of the common law duty of a man to support his wife, and the awards made pursuant to them establish that the same concerns govern their application today. As a “silent party” in Mr. and Ms. Orr's divorce proceeding Alabama injected its public policy considerations founded on centuries old notions of womanhood into the sensitive and intimate affairs of the parties. The qualitative nature of this intrusion and the classifications controlling it are in direct opposition to the philosophy of the Equal Protection Clause. The protection of that clause extends to “persons”, and a state can not avoid its application by relying on gross generalizations concerning aggregate groups. Moreover, the generalizations behind Alabama's alimony statutes are not even close to being accurate today. According to the 1970 census, women comprised approximately 38% of Alabama's civilian labor force, and 61.6% of those women were married with a husband present. U.S. Bureau of the Census, COUNTY AND CITY DATA BOOK, 1972 (1973), p. 32. In *Taylor v. Louisiana*, 419 U.S. 522, 535n.17 (1975), this Court reviewed simi-

lar figures on women's employment across the country and, after noting that 51.2% of mothers whose husbands were present were in the work force, stated that these figures put to rest the notion that women serve a particular home related function. The practical reality that women, married or not, participate in worldly affairs in Alabama and across the country in such substantial numbers belies any practical foundation for Alabama's solicitous protection of them through its alimony laws. In *Taylor*, the Court held that the appellant's Sixth Amendment right to a jury drawn from a fair cross section of society was not affected by the "distinctive role in society" which women have traditionally served so as to allow all women an absolute exemption from jury service. Of course Mr. Orr does not assert a Sixth Amendment right to counter balance Alabama's gender classification, but he is suffering an immediate burden demonstrably based on that classification — an alimony obligation in excess of \$1,600.00 per month — and *Taylor* stands for the proposition that Alabama's protection of Ms. Orr's "role in society" is not in and of itself an important governmental objective. In this context Alabama's intrusion into the sensitive areas of marriage and divorce is all the more gross and arbitrary.

III.

THE GENDER DISTINCTION DRAWN IN ALABAMA'S ALIMONY STATUTES DOES NOT SERVE ANY IMPORTANT OR LEGITIMATE GOVERNMENTAL OBJECTIVE.

The historical origins and purpose of the challenged statutes have already been presented to the Court. Patently Alabama's historical objective of extending a husband's support obligation after divorce is not a

legitimate, much less important, governmental objective. The thrust of every gender discrimination decision rendered by this Court is to the effect that neither a state nor national government can rely on "archaic and overbroad generalizations," *Schlesinger*, 419 U.S. at 508, about the sexes to allocate their benefits and burdens. A fortiori, then, Alabama can not allocate its benefits and burdens to perpetuate the stereotypes encompassed in those generalizations, and the state certainly can not structure personal responsibilities between its citizens to perpetuate those stereotypes.

In *Stanton v. Stanton*, 421 U.S. 7 (1971), this Court held Utah's statutory scheme which provided for different ages of majority for males — age 21 — and females — age 18 — unconstitutional in the context of child support. The mother and father of a boy and girl were divorced, and under their divorce agreement the father was obligated to pay support with respect to each child until he or she reached majority. When the girl reached 18, her father quit paying support with respect to her, and her mother sued him claiming that the different ages of majority discriminated against her and her daughter on the basis of her daughter's sex. The Supreme Court of Utah justified and upheld the discriminatory age of majority differential by reference to the "old notion" that men generally have the responsibility of being a provider for their families so they need support over a longer period of time than women to prepare for their provider role. *Stanton v. Stanton*, 30 Utah 2d 315, 517 p.2d 1010 (1974). This Court reversed that decision stating that the traditional male/female role models are not longer functional and could not justify the father's different responsibilities since "[a] child, male or female, is still a child" for the purpose of support laws. 421 U.S.

at 414. To the same extent that Utah could not determine the responsibility of a parent to his or her child by reference to the sex of the child, Alabama can not determine the obligations of Mr. Orr to Ms. Orr by reference to their sexes.

Similarly, neither Ms. Orr nor the Courts of Alabama have indicated any purpose which the gender classifications of the statutes, as opposed to the statutes themselves, may serve. The Court of Civil Appeals apparently assumed that *Kahn*, 416 U.S. 351, established that classifications benefitting women but not men are by definition for a proper purpose. Thus, in his concurrence joined by Justice Bloodworth, Justice Almon of the Supreme Court of Alabama expressed his dissatisfaction with an earlier decision of the court and said "It appears, when viewed in isolation, that statutes which restrict the rights of women are unconstitutional. On the other hand statutes which grant women rights which men do not possess are not unconstitutional." Ala., 351 So.2d at 906. This conclusion is unsupportable however. Just recently in *Regents of the University of California v Bakke*, 46 U.S.L.W. 4896 (1978), a majority of the court held in one form or another that the University could constitutionally operate an affirmative action plan facilitating qualified Black students' entrance into one of its medical schools. In his opinion announcing the judgment of the Court, Justice Powell emphasized that a racial classification without regard to some external justification was facially invalid: "[p]referring members of one group for no other reason than race or ethnic origin is discrimination for its own sake. This the constitution forbids." 46 U.S.L.W. 4906. Since gender classifications are within the prohibitions of the Equal Protection Clause, Justice Powell's conclusion applies in this case to invalidate Alabama's

alimony statutes absent some principle external to them justifying their classification.

In any event, however, the Court of Appeal's understanding of *Kahn* is faulty. In *Kahn* this Court was properly deferential towards the manner in which Florida implemented its policy of aiding women. In upholding the tax exemption the Court noted that the statute's discrimination not only made Florida's administration of the law more convenient, but also that with regard to equal protection " 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' " 416 U.S. at 355, quoting from *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 359 (1973). Because of these factors, the gross gender classification was a legitimate means by which Florida could implement the statute's purpose. In essence the Court held that the leeway given states in formulating their tax programs excused much of the Florida's burden of establishing a particular rationale for its discrimination so that the administrative convenience resulting from the statute's absolute exclusion of men was a sufficient justification even though it would not have been otherwise. Alabama did not even gain any administrative convenience by limiting a right to alimony to Ms. Orr, however. All of its alimony statutes required the Circuit Court of Lee County to make some sort of an investigation, since it had to exercise its discretion, and to pay particular regard to the estate of Mr. Orr. Consequently no further burden would have been placed on the court by considering giving alimony to Mr. Orr. Further, the award of alimony to Ms. Orr and its enforcement was not an exercise of state largesse comparable to a tax exemption. Ms. Orr did not simply get a benefit which was denied to Mr. Orr, but Mr. Orr was personally

burdened with conferring that benefit which greatly exceeds \$500.00. The tax exemption considered in *Kahn* was treated by the Court as a manner in which the state, as a society, could preliminarily redress some of the economic discrimination which the society would soon direct at the widow as a woman, but the alimony award to Ms. Orr was not society's burden and was not meant simply to facilitate Ms. Orr's entry into the male dominated job market. The award was intended to avoid any loss to Ms. Orr at all of Mr. Orr's support as a financing spouse.

Further, those cases noted earlier concerning the purpose of statutes which classify along gender lines also apply to this case with regard to the degree to which the objective of the discrimination must be shown. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court struck down Oklahoma's age differential between men and women for the legal purchase of certain beers. Oklahoma argued that because its arrest records showed twice as many young men arrested for alcohol related traffic violations than young women, the state was justified in requiring men to wait until age 21 to buy 3.2% beer while allowing women to buy it at age 18. Without considering the particular standards of review articulated by the various justices in their opinions, the decision itself established that a cursory statistical generalization as presented in *Kahn* will no longer satisfy the equal protection test quoted from *Reed v. Reed*, 404 U.S. 71, 76 (1971), and *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) and applied in *Kahn*, 416 U.S. at 355: that the discrimination between men and women "rest upon some ground of difference having a fair and substantial relation to the object of the legislation." In short, whether this Court now takes a "middle-tier" approach to gender discrimination cases or only applies

the "rational basis" test with more scrutiny, see *Craig*, 429 U.S. at 210n.* (Powell, J., concurring), the deference traditionally accorded a system of classification under the "rational basis" test is no longer as extensive in gender discrimination cases as it was when *Kahn* was decided.

While the Court was willing in *Craig*, 429 U.S. 190, to "accept for the purpose of discussion the District Court's identification of the objective underlying" the discriminatory statutes, that acceptance was in the context of the statutes' ultimate invalidity, and concerning the present case a comparison of *Schlesinger*, 419 U.S. 498, and *Webster*, 430 U.S. 313, to *Wiesenfeld*, 420 U.S. 636, and *Goldfarb*, 430 U.S. 199, establishes that the Court will not normally accept a mere assertion of benign intent as a justification. In *Schlesinger* the discrimination was drawn with reference to the "demonstrable fact" that men and women naval officers were not similarly situated with reference to professional opportunities, 419 U.S. at 508, and in *Webster* the discrimination was drawn with reference to actual employment inequities the existence of which particularly noted in the debate in the House of Representatives concerning the challenged statute. In contrast to these cases, neither Ms. Orr nor the courts of Alabama have specified any particular evidence that women are more needy upon divorce than men. Rather they have relied on *Kahn's* evaluation of the economic status of women, which was based on figures taken 8 years ago, and have not considered the possible effect of the Equal Pay Act of 1963, 29 U.S.C. §206(d), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a), or any other legislation meant to standardize employment opportunities and benefits for men and women.

Ms. Orr can not present the Court with an important governmental objective justifying the discrimination of Alabama's alimony statutes because none exists. Rationally Alabama has no reason to exclude men from the class of potentially needy spouses upon divorce, and their exclusion does not practically benefit the state in any way. Alabama's alimony statutes are an example of a traditional classification being used "without pausing to consider its justification.... Habit rather than analysis [made] it seem acceptable and natural to distinguish between male and female," *Mathews v. Lucas*, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting), upholding a requirement that illegitimate children prove dependency on their deceased father prior to receiving social security benefits with respect to his death.

IV.

THE CLASSIFICATIONS DRAWN IN ALABAMA'S ALIMONY STATUTES ARE NOT SUBSTANTIALLY RELATED TO THEIR OBJECTIVES AND DO NOT HAVE A FAIR AND SUBSTANTIAL RELATION TO THE STATUTES' OBJECTIVES.

Although the statutes' historical purpose of extending the common law duty of a man to support his wife is served by Alabama's requiring only men to pay alimony, that purpose is not a legitimate object of legislation since, by definition, it decrees that all persons similarly situated will not be treated alike. In a like view, the statutes are not a fair way of implementing the purpose of protecting a needy spouse after divorce. If a needy husband is not given the same rights against his spouse as a needy wife, then the protection afforded them by Alabama's alimony statutes is neither fair nor equal.

To the extent that Alabama's alimony laws presume that a woman is not capable of dealing in worldly affairs,

they also irrevocably burden her husband with compensating for her incapacities even after divorce. The State in effect arbitrarily conditions a man's participation in legal marriage and procreation, two fundamental rights, on his assumption of the burdens of his mate. Mr. Orr is burdened with alimony solely because of his status as a divorced man, and laws which allocate responsibility and economic burdens vis-a-vis two adults according to their respective statuses are simply not fair. Moreover, while the Court of Civil Appeals asserts that the purpose of the statute is to aid needy wives, the earlier discussion of *Shirley*, Ala.Civ.App., 350 So.2d 1041, reflects that the size of an alimony award is actually determined by reference to many other factors and the wife's need plays only a minor role. To the extent that Mr. Orr's \$1,600.00 per month alimony obligation is founded on factors other than Ms. Orr's need, this obligation is neither fairly nor substantially related to the purpose of the statutes by which it is authorized.

Again, too, the cases decided by this Court since *Kahn*, 416 U.S. 351, indicate that statutes which are intended to benefit a particular class can do so only remedially and their remedy must be directly related to the inequity at which they are directed. Thus in *Schlesinger*, 419 U.S. 498, the Navy was justified in allowing women more time than men in which to receive a promotion before being discharged in view of the fact that the Navy's system of service did not allow women the same opportunities for advancement over the same period of time, and in *Webster*, 430 U.S. 313, women could be advantaged in calculating social security retirement benefits based on employment income since they had not been receiving salaries equal to men for comparable work. Neither Ms. Orr nor any court of Alabama has explained how awarding alimony to women only is particularly related to any

injury to women. Rather, because the alimony statutes assign general responsibilities based on status, they inherently avoid focusing on and articulating any particular problem or remedy. Similarly, by reliance on status and by maintaining the financial marriage, alimony in Alabama is not remedial, but regressive.

Kahn and *Schlesinger* involved efforts to ease a woman's entrance into a male dominated society, while *Webster* compensated a woman for the discrimination which she suffered as a participant in that society. These cases realized that the Equal Protection Clause was written to do away with legal status so that all people could rise or fall to their own level of success based on their own attributes but that sometimes distinctions must be drawn between the sexes to provide each man and woman an equal opportunity to rise or fall. Mr. Orr's alimony obligation, however, was not intended to help Ms. Orr enter the economic world but to support her so that she need not do so. Further, since Mr. Orr's obligation would presumably be modified if Ms. Orr were to accept employment and earn wages, the system of alimony motivates her to remain protected at home. Of course this point is not meant to argue any generalizations about women or the actual effects of Alabama's alimony program, but it does point out the incongruity between Alabama's alimony statutes and the statutes upheld in *Kahn*, *Schlesinger* and *Webster*.

These cases provide another useful comparison. As explained earlier, *Kahn*, 416 U.S. 351, held that a state may adjust its tax program to relieve some of its burden with respect to members of a class which is shown particularly to suffer economic discrimination. Society lightened a widow's tax burden since it believed she would suffer a correlative burden with her entrance into its male dominated job market. This premise does not, however, com-

pare to Alabama's laying of a personal burden on Mr. Orr as a particular member of a class without ever establishing some correlation of responsibility between him and Ms. Orr as the beneficiary of his burden. Without establishing this correlation, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." *Bakke*, 46 U.S.L.W. at 4906, 4907 (Powell, J.) The record in this case does not show that the Circuit Court of Lee County ever investigated or made any findings regarding Ms. Orr's actual needs or whether Mr. Orr was in any way responsible for her economic and commercial incapacity. Instead, by the Court of Civil Appeals' reliance on *Kahn*, Mr. Orr is apparently saddled with personal responsibility for protecting from injustices to which society, and necessarily not he, will submit her. Obviously this sort of liability is not substantially or practically related to any sort of proper governmental objective. Again quoting from Justice Powell in *Bakke*, 46 U.S.L.W. at 4907:

'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of social discrimination. That is a step we have never approved.

V.

THE GENDER DISTINCTION DRAWN IN ALABAMA'S
ALIMONY STATUTES INJURES MEN, WOMEN AND
SOCIETY AS A WHOLE.

The immediate injury to Mr. Orr caused by these statutes is obviously his \$1,600.00 per month alimony obligation. But for these statutes, he could not be charged with alimony under Alabama law. "[T]he jurisdiction and authority . . . to make allowances to the wife 'out of the estate of the husband,' temporary and permanent, is a statutory and limited jurisdiction," *Gabbert v. Gabbert*, 217 Ala. 599, 601, 117 So. 214, 215, 216 (1928), affirming a lower court's dismissal of a petition to modify an award of alimony on the grounds that the court did not retain jurisdiction over the matter. While a wife has the common law right to support from her husband, "[a] divorce without alimony cuts off the right. *Sims*, 235 Ala. at 311, 45 So.2d at 29. Thus, absent the authority of the challenged statutes Mr. Orr would have no alimony obligation at all.

The grant of the authority to award alimony also contains a charge to the court, however. *Ortman*, 203 Ala. 167, 82 So. 417, shows that the trial court's concern with alimony is public as well as private and its awards must protect the state from having to deal with divorced women as its wards. Similarly, in *Russell v. Russell*, 247 Ala. 284, 24 So. 2d 124, 126 (1946), the court instructed the lower court in dictum that a settlement agreement signed by the parties was not binding on the lower court but must be reviewed with regard to "whether the amount as stipulated is fair to the wife." Not only the gender classifications, then, but the whole scheme of Alabama's alimony law charged the Circuit Court of Lee County to protect Ms. Orr's interest at the expense of Mr. Orr and effectively deprived him of a

fair forum in which to resolve the financial issues raised when Ms. Orr petitioned for divorce. Just as a petitioner for divorce must be provided with a forum which will hear and act on his or her petition, *Boddie*, 401 U.S. 371, Mr. Orr had a right under the Equal Protection Clause to have the issues of his divorce settled without regard to the sex of the parties.

As a practical matter, the discriminatory classifications and impact of Alabama's alimony statutes also prevented Mr. Orr from equitably negotiating a property settlement agreement. In preliminary property settlement negotiations with Ms. Orr, Mr. Orr and his attorney were presumably aware of the thrust of these statutes and the wild card advantage which they would give Ms. Orr before the trial court. This derivative taint from the statutes' discrimination was not merely incidental to their application. Their purpose was to structure the continuing legal relations between a married couple along traditional gender models, and that purpose was fulfilled by virtue of their derivative effect as much as if they had been enforced by the Circuit Court in those negotiations.

The manner in which these statutes were applied and their gender classifications also obviously affected Ms. Orr, and simply because their asserted purpose accrued to her financial benefit, they were not necessarily without harm to her. As Justice Powell noted in *Bakke*, "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." 46 U.S.L.W. 4896, 4904. As Mr. Orr has documented, Alabama's alimony system sets up just such a stereotypical program; Ms. Orr was eligible to receive alimony simply because the state assumed she, as a woman, was incapable of merely providing for herself. The Court

has noted the evils of this sort of stereotyping innumerable times when the discriminatory intent of a challenged statute or practice was directed against rather than in support of the typed class, but the injury to the person can be equally as great whether the statute or practice purports to help or hinder. In *Doing Good*, authorities from four disciplines discuss and analyze the various effects of legal paternalism. As a psychiatrist and psychoanalyst Dr. Williard Gaylin points out that a state must act to support the intrinsically dependent who actually can not provide for themselves. He goes on to say however:

The second group, the extrinsically dependent, are those I define as individuals made dependent by artifacts of our culture. They have the intrinsically capacity for nature and autonomous functioning, but because of social or economic roles are in positions where they are incapable of supporting themselves at the most fundamental level. This group would include the poor, certain of the elderly, women constricted by cultural definitions, and even more groups whose dependence seems so logical and inevitably part of their lives that we do not recognize it as an artifact. . . . It is an indignity for an adult who has no intrinsic needs for care and maintenance to be reduced to the level of a child - with all the concomitant humiliations - because of a social system that deprives him of the rites of passage into maturity.

W. Gaylin, I. Glasser, S. Marcus and D. Rothman, *DOING GOOD* (1978) at 29, 30. While the effect of this humiliation to women caused by the discrimination of Alabama's alimony laws can not be easily identified or quantified in particular, it is none the less very real, and this Court should note it.

Similarly, to the extent that the challenged statutes regulate human relations, society as a whole suffers. In *The Second Sex*, Simone de Beauvoir chronicles at length the injury, realized or not, to all of us caused by "separate but equal" treatment of the sexes and concludes that only by the cessation of this treatment can men and women begin to fully enjoy their relations with one another as full and complete people. While this Court is certainly not a council implementing sociological propositions, de Beauvoir's analysis is pertinent. The Equal Protection Clause was written to insure the protection of certain rights so that all people will be accorded the dignity which they deserve. The framers of the Fourteenth Amendment intended to affect society and direct its organization to protect the freedom of each of its members. But this goal was not meant to be an end in itself; it was part of an effort to make this nation a qualitatively better place for each of us to live. To the extent that the principles and stereotypes embodied in Alabama's alimony statutes undermine this effort, the statutes are in opposition to the spirit, as well as legal content, of the Equal Protection Clause.

CONCLUSION

For the reasons stated, Alabama's alimony statutes deny equal protection of the law to each person subject to their application and should be declared unconstitutional.

Respectfully submitted,

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